

No. 11832

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHESTER WALKER COLGROVE, Trading and Doing Business Under the Firm Name of Colusa Remedy Company, and COLUSA REMEDY COMPANY, a Corporation.

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF.

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APPELLEE'S SUPPLEMENTAL BRIEF.

Appellants have filed a supplemental brief, most of which is devoted to further argument and reiteration of points already covered in the main briefs.

I.

Newspaper Advertising Is Not Labeling.

Appellants contend most emphatically that newspaper advertising is not "labeling" within the meaning of the Federal Food, Drug, and Cosmetic Act. (Appellants' Supp. Br. 17-23.) The Government has made no contention to the contrary. Rather, we have consistently pointed out that the injunctions upon which the present contempt

action was based in no way regulated, or attempted to regulate, appellants' newspaper advertising. (Appellee's Br. 23.) The injunctions were directed entirely at the labeling of the product—a subject plainly within the jurisdiction of the Court below. (Appellee's Br. 17-18.)

II.

Willfulness Is Not a Statutory Element of the Offense Charged.

Appellants now seek to inject one new point into this proceeding, a point not heretofore raised in the District Court or in this Court. They assert that the statute authorizing this contempt action requires a *willful* disregard of the Court's injunctions. (Appellants' Supp. Br. 6-14.) Since the instant Information does not charge that the acts of disobedience were willful, Appellants conclude that the Government failed to charge an offense.

Where a statute specifies that willfulness is an element of an offense, then, of course, an information based upon that statute should ordinarily charge that the act complained of was done willfully.

The fallacy in Appellants' argument is that it relies upon the wrong statute. Appellants, in their latest brief (pages 7-8), set forth two sections of the Clayton Act which seemingly support their position. [28 U. S. C. 386, 387.] However, Appellants fail to call attention to a third section of the Clayton Act, 28 U. S. C. 389, which reads in pertinent part:

“Nothing contained in sections 386 to 388 and 390 of this title shall be construed to relate to contempts committed in . . . disobedience of any unlawful writ, process, order, rule, decree, or command *entered*

in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section 386 of this title, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914.” (Emphasis added.)

Since the injunction suits in the instant case were brought *in the name of and on behalf of the United States* pursuant to the authority of the Federal Food, Drug, and Cosmetic Act [21 U. S. C. 332(a) and 337], it is clear that the requirement of willfulness as set forth in the Clayton Act [28 U. S. C. 386] is not applicable here. See *Forrest v. United States*, 277 Fed. 873, 876 (C. C. A. 9, 1922), cert. denied 258 U. S. 629; *Hill v. United States ex rel. Weiner*, 300 U. S. 105, 108 (1937). In our opening brief, page 34, footnote 3, we have already indicated the limited extent to which one section of the Clayton Act [28 U. S. C. 387] is applicable.

In the absence of a specific governing statute, the federal courts have general authority to punish contempts under Section 268 of the Judicial Code, 28 U. S. C. 385.¹ [See *Cyclopedia of Federal Procedure*, 2nd Editions, Sections 7222 and 7232.] This provision declares:

“The courts of the United States shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power

¹This provision now appears in substantially the same language in the new Title 18, United States Code, Section 401. It will be noted that Section 402 of new Title 18 is the equivalent of former 28 U. S. C. 386-389. Willfulness remains an element of Section 402 but is still not an element of Section 401.

to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, *and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.*” (Emphasis added.)

Manifestly, the word “willful” does not precede the word “disobedience” in this provision. For this reason alone, we submit that an Information based on this statute is not defective if it does not charge that the contemptuous acts were done “willfully.”

Moreover, there are a number of cases which rest upon the proposition that disobedience of a court order without more is a punishable act of contempt, and that the good faith or intent of the defendant may serve only in mitigation of the penalty, not as a defense.

Thus, in *Eustace et al. v. Lynch*, 80 F. 2d 652 (C. C. A. 9, 1935), this Court said at page 656:

“While the advice of an attorney is not a defense to an act of contempt, it is a matter to be considered in mitigation in a trial for criminal contempt.”

In the case of *In re Braun*, 259 Fed. 309 (M. D. Pa., 1919), the Court stated at page 311:

“Though there was disobedience to the command and order of the court, the evidence satisfies the court that there was no actual moral intent to defy the court

or its order, and, while this is no defense, it serves to mitigate the punishment.”

In *United States v. Sanders*, 290 Fed. 428 (W. D. Tenn., 1923), it was demonstrated to the satisfaction of the Court that defendant’s publication tended to obstruct justice. The Court then considered defendant’s argument that he had not intended to speak disrespectfully of the Court, saying on page 437:

“If there was no intention to reflect upon the court this can only be considered in mitigation of the offense.”

To the same effect, see also:

United States v. Ford, 9 F. 2d 990, 992 (D. Mont., 1925);

In re Sylvester, et al., 41 F. 2d 231, 236 (S. D. N. Y., 1930);

United States v. Johnson, 52 Fed. Supp. 382, 384 (W. D. N. Y., 1943).

Appellants quote at some length from *Screws v. United States*, 325 U. S. 91, 100-101. The statute there involved had been specially amended by Congress in order to add the word “willfully.” Justice Douglas points out (pages 106-7) that not only did the indictment not charge that the offense had been committed willfully, *but also the charge to the jury failed to instruct the jury that before returning a verdict of guilty they must find defendants to have acted willfully.*

In contrast to the situation which prevailed in the *Screws* case, the statute upon which the present case is

based does not specify willfulness as an element of the offense, *yet at the trial both the Court and the attorneys assumed that a criminal intent had to be established.* [R. 74-77.] Consequently, as a practical matter, Appellants received the full benefit which might have been derived from the inclusion of the word "willful" in each Count of the Information. Hence, the defect, if any, in the Information was harmless.

Furthermore, the *Screws* case itself suggests the correctness of the construction which we urge for 28 U. S. C. 385, in accordance with its plain terms. At page 103 the Supreme Court said:

"Moreover, the history of §20 affords some support for that narrower construction. As we have seen, the word 'willfully' was not added to the Act until 1909. Prior to that time it may be that Congress intended that he who deprived a person of any right protected by the Constitution should be liable without more. *That was the pattern of criminal legislation which has been sustained without any charge or proof of scienter. Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57; *United States v. Balint, supra.*" (Emphasis added.)

The Supreme Court has upheld the validity of criminal statutes which do not prescribe "criminal intent" or "willfulness" as an element, and has given effect to the Congressional conclusion not to make intent or willfulness a necessary element.

Thus in *United States v. Dotterweich*, 320 U. S. 277, the Court declared (page 281) that the Federal Food, Drug, and Cosmetic Act dispenses with the conventional

requirement for criminal conduct—awareness of some wrongdoing.” Accord:

Triangle Candy Co. v. United States, 144 F. 2d 195, 199 (C. C. A. 9, 1944);

Barnes et al. v. United States, 142 F. 2d 648, 651 (C. C. A. 9, 1944);

United States v. Greenbaum, 138 F. 2d 437 (C. C. A. 3, 1943).

It will be noted that the contemptuous acts here involved were also violations of the Federal Food, Drug, and Cosmetic Act [21 U. S. C. 331(a)] for which criminal prosecution could have been brought under 21 U. S. C. 333(a) without charging “a criminal intent.” [See 21 U. S. C. 332(b).] Since the Court’s power to punish for contempt was here invoked, and since the statute upon which that power is based does not specify “criminal intent” or “willfulness” as an element, we submit it was entirely proper not to inject the element of willfulness into the instant Information.

It is submitted that the Court should give full weight to the statute’s [28 U. S. C. 385] declared purposes of preventing obstruction of the administration of justice and disobedience of the orders of a Court. When a Court issues an order, that order should be obeyed. If it is not obeyed, there is a contempt. Unless the Court can exact obedience, its authority and dignity are impaired. Extenuating circumstances such as good faith or ignorance, if present in a particular case, may properly be considered by the Court, not for the purpose of determining whether the defendant disobeyed the order, but rather for the purpose of perhaps mitigating the penalty.

III.

The Meaning of “Prescribed, Recommended, and Suggested.”

Appellants’ Supplemental Brief is interspersed with arguments repeating those already made both in their opening brief and orally, regarding the meaning of the words “prescribed, recommended, and suggested” as they appear in the injunctions. In addition to all that we have said in our original brief (Appellee’s Br. 24-30) and in oral argument establishing defendants’ violation of this command, we submit that these words should at least be given the primary meaning which the defendants understood them to have.

Defendant Colgrove felt that if he “advertised” his oil for certain ailments, then he “prescribed, recommended, and suggested” the oil for those ailments. Thus he testified [R. 62]:

“I did not ‘prescribe’ on the label for any of the fine-print diseases in the advertisement. *I had no intention of advertising any of the diseases in the advertisement except those that were highlighted in big type*; and that arrow pointing to those pictures was the intention of the arrow, and not pointing to the entire balance of the advertisement.” (Emphasis added.)

Defendant Colgrove further testified [R. 64]:

“Q. Mr. Colgrove, after the injunction the only change you made in the advertising was to delete the word ‘Acne,’ is that right? A. In that advertisement; yes, sir.

Q. And you felt after that proceeding before this court that by deleting the word 'Acne' from your advertising you were complying, in good faith, with the injunction of this court? A. I did; *because I felt that before deleting the word I was advertising for the five diseases named in the heading advertisement in the large type, and that as long as 'Acne' was not in the new label, I was obliged to delete it and did so.*

Q. But it is a fact, although deleting 'Acne' from the large print, it does appear in the testimonial part of the advertisement, is that right? A. *That is true, but it is not as advertised.* Those things are psychologically cumulative and supportive. *They were not definitely advertised.*" (Emphasis added.)

From the foregoing testimony it is clear that defendant Colgrove understood the injunctions to require that the labeling of Colusa Natural Oil come into the open and state all of the disease conditions for which the oil was "advertised." Nevertheless, the labeling stated only the four disease conditions that were highlighted in the advertising, and did not state the eight other disease conditions that appeared in the smaller print of the advertisement. In attempting to justify his action which was inconsistent with his own understanding of the requirements of the injunction, he offers the tenuous reasoning that two-thirds of the advertisement (the small print) is not "advertising," but merely "psychologically cumulative and supportive." We submit that this exercise in semantics ought not persuade this Court any more than it did the District Court.

IV.

Regulation of Cosmetics.

On page 15 of Appellants' Supplemental Brief, counsel seeks to impress this Court with a description of the dire consequences which would allegedly flow from an affirmance in this appeal: the label of every cosmetic case would have to bear adequate directions for using its powder puff to overcome "shiny skin." Counsel overlooks the fact that the Federal Food, Drug, and Cosmetic Act was carefully drafted. *United States v. Sullivan*, 68 S. Ct. 331, 337. Separate provisions of the Act define and deal with cosmetics, and prescribe special conditions under which cosmetics are adulterated or misbranded. [21 U. S. C. 321(i), 361, 362, 363, 364.] Even a casual perusal of these provisions will show that there is no requirement that the labeling of a *cosmetic* bear adequate directions for use, while of course, the *drug* provisions do so require. [21 U. S. C. 352(f).] It is hardly necessary to labor the reasons why Congress distinguished in this, and other ways, between a drug and a cosmetic.

V.

Form of Judgment.

Appellants complain that the judgments as filed used the word "or" rather than "and" in describing the offenses. [R. 34, 36.] They assert that this alone should reverse the judgments. (Appellants' Supp. Br. 3.) But the record is plain that at the close of the trial the Court found the defendants guilty "as charged" [R. 78, 79] in Counts

1-8 of the Information. And it is well settled that the judgment in a criminal case is the pronouncement by the judge from the bench, not the entry of the judgment by the Clerk.

Wilson v. Bell, 137 F. 2d 716, 720 (C. C. A. 6, 1943);

Walden v. Hudspeth, 115 F. 2d 558, 559 (C. C. A. 10, 1940).

Conclusion.

Such other matters as are adverted to in Appellants' Supplemental Brief have already been dealt with in our original brief and in our oral argument. We respectfully submit that the judgments of the District Court should be affirmed.

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